International Longshoremen's Association, Local 333, AFL-CIO (ITO Corporation of Baltimore) *and* **Roger Lee Moore.** Case 5-CB-4065

30 September 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 22 November 1982 Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found, *inter alia*, that the Union did not violate Section 8(b)(1)(A) and (2) of the Act on the morning of 27 May 1982[1] when Edward Lee Howell, its walking delegate, ordered Donald Schlichting, a gang carrier (crew leader), to remove employee Roger Lee Moore from the crew for "interfering with" Howell's performance of his duties as an official of the Union. We disagree with this finding for reasons which follow.

As indicated by the Administrative Law Judge, it is the practice of the Employer, a stevedoring firm, to inform the Union each evening what work is to be done on the docks on the next day. When less than a full 12-man crew is needed, union policy requires the gang carriers to select members for such "short crews" on a rotation basis. Thus, upon receiving an order from the Employer for a crew of five men for 27 May Schlichting selected Moore and four others, all of whom were part of a seven-man crew which had worked on the previous day but only for a brief time as a result of equipment problems.[2]

On the morning of 27 May Union President Garris McFadden received a complaint from employee David Gelleta about not receiving an assignment for that day even though he had not worked the day before. McFadden thereupon told Howell to have Schlichting replace any one member of the crew with Gelleta. Howell sought out Schlichting and directed him to drop any member of Schlichting's choice in order to make room for Gelleta. Moore then intervened and questioned Howell's authority or right to issue such instructions and advised Schlichting not to comply therewith. When Moore reiterated his doubts and dissatisfaction with the Union and Schlichting refused to take the action requested by Howell, the latter ordered the removal of Moore from the crew because he "interfered with" the exercise of Howell's union duties. As the Administrative Law Judge observed, tempers ran high on this occasion and the conversation of the participants "was laced with profanity commonly used on the docks."

It is well established that an employee has a statutory right to voice dissatisfaction with a union's conduct and its policies, regardless of their propriety, without suffering reprisal by being deprived of work for so doing.[3] The Administrative Law Judge concedes that a union member cannot lawfully be caused to lose work because of a disrespectful, abusive, or uncooperative attitude toward a union official.[4] Although he also concedes that Moore's questioning of Howell's authority was protected from adverse job action at the behest of the Union, the Administrative Law Judge errs in deeming Moore's conduct so "opprobrious" as to cause the forfeiture of statutory protection. In so holding, the Administrative Law Judge again errs by invoking *Atlantic Steel Co.*, 245 NLRB 814 (1979), wherein the Board gave conclusive effect to an arbitrator's decision upholding the discharge of an employee on the basis of his entire record—including poor work performance, a poor attendance record, and violation of a supervisor's order not to curse in the presence of female employees—and not solely because of the employee's obscene language directed at a foreman. As already indicated, the setting herein was entirely different from the situation in the foregoing case. Here Moore, whose record and work performance were not in issue, was exercising his protected right to question the Union's authority with respect to its rotation policy. That Moore in common with union official Howell resorted to strong language which is not unusual on the docks, albeit not in conformity with Emily Post standards of etiquette customary in more genteel surroundings, cannot justify the Union's reprisal against Moore by having him removed from the crew on 27 May. Accordingly, the conduct can not under the circumstances herein be deemed "opprobrious." We therefore hold, contrary to the Administrative Law Judge, that the Union, by bringing about the removal of Moore

[1] All dates below refer to 1982.

[2] That crew was therefore given 4 hours report in pay as provided by the Union's collective-bargaining agreement with the Employer.

[3] *Auto Workers Local 227 (Chrysler Corp.)*, 182 NLRB 182, 187 (1970).

[4] *Hod Carriers Local 300 (Desert Pipe Line Construction Co.)*, 145 NLRB 1674, 1678 (1964).

from the crew on 27 May, violated Section 8(b)(1)(A) and (2) of the Act.

The Administrative Law Judge also found that the Union did not violate Section 8(b)(1)(A) and (2) of the Act by a statement of Howell that Moore, who filed a charge with the Board on Thursday, 27 May, did not have a job on the next day and that he should go to the Board if he wanted one. In so holding, the Administrative Law Judge characterizes that statement as "just what it was taken to mean by [Schlichting who was told by Howell to relay it to Moore]—a non-threatening, non-coercive, emotional release at the conclusion of a tumultuous day." In addition, the Administrative Law Judge relies on the fact that Schlichting "routinely assigned to Moore work on [the next day] Friday (which ran over onto Saturday) and on Sunday (which ran over onto Monday)."

For reasons given below, we concur in the Administrative Law Judge's finding that Howell's statement was not unlawful, but we disavow his rationale to the extent that he applies a "subjective" test in reaching that result.

As already indicated, Moore was removed from the crew on the morning of 27 May and consequently did not work on that day. Moore thereupon told Howell and Union President Garris McFadden that he was going to file charges with the National Labor Relations Board. Later that day, Moore, who was accompanied by Schlichting as a "witness," did so. About 7:30 that evening, Howell, as noted above, instructed Schlichting to tell Moore that he did not have a job the next day and that he (Moore) should go back to the Labor Board and get a job. The following morning (Friday), Moore reported to Schlichting and, as the Administrative Law Judge found, not only worked a full day plus overtime but also received another such lengthy assignment on Sunday. According to Moore, he was at work on Friday when Schlichting conveyed to him Howell's Thursday evening message that he did not have a job the next day (Friday) and if he "wanted a job to go to the Labor Board and get a job."

In determining whether Howell's statement constituted an unlawful threat, the test is not the subjective reaction of the employee to whom it is directed. Rather, it is well established that the test is whether the alleged misconduct is such that it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.[5]

It is significant that Moore was already at work on Friday when he was apprised of Howell's statement that he no longer had a job and would not be permitted by the Union to work for the Employer on that day. It is also significant that Moore was assigned to work for more than a full day on Friday as well as on Sunday without any apparent interference or protest from Howell or any other union official. Therefore, it cannot reasonably be concluded under these circumstances, which rendered Howell's statement nugatory, that it tended to coerce or intimidate Moore in the rights guaranteed him by the Act. Accordingly, we find under the objective test set forth above that the statement in question did not violate Section 8(b)(1)(A) and (2) of the Act.[6]

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act by causing the removal of Roger Lee Moore from the crew on 27 May 1982, we shall order that it cease and desist from such conduct and that Respondent make him whole for any loss of earnings sustained by reason of the discrimination against him with interest computed thereon in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[7]

CONCLUSIONS OF LAW

1. ITO Corporation of Baltimore is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Longshoremen's Association, Local 333, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By attempting to cause, and causing, ITO Corporation of Baltimore to remove Roger Lee Moore from the crew on 27 May 1982, in violation of Section 8(a)(3) of the Act, and by restraining and coercing him in the exercise of rights guaranteed in Section 7 of the Act, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

[5] See *Laborers Local 496 (Newport News of Ohio)*, 258 NLRB 1105 (1981); and *Steelworkers Local 1397 (United States Steel Corp.)*, 240 NLRB 848 (1979).

[6] Member Hunter agrees with his colleagues that the proper test is not the subjective reaction of the particular employee or employees to whom a statement is directed but rather whether a particular statement reasonably tends to coerce or intimidate employees in the exercise of protected rights. However, unlike his colleagues, Member Hunter would find an additional violation in the statement communicated to employee Moore that he would not have a job if he filed a charge with the Board. The mere fact that the Union took no immediate overt steps to interfere with Moore's employment in no way vitiated or diluted the clear threat of possible future retaliation for engaging in employee rights protected by law.

[7] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not otherwise engaged in unfair labor practices.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Longshoremen's Association, Local 333, AFL-CIO, Baltimore, Maryland, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause ITO Corporation of Baltimore to discriminate against employees in violation of Section 8(a)(3) of the Act by removing employees from crews and depriving them of work in reprisal for expressing dissatisfaction with or questioning the Union's rotation policy or its implementation.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole Roger Lee Moore for any loss of pay he may have suffered by reason of his removal from the crew on 27 May 1982 as provided in the section herein entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all such records, reports, and documents as may be in its possession, custody, or control necessary or appropriate to analyze the amount of backpay due under the terms of this Order.

(c) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by said Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT cause or attempt to cause ITO Corporation of Baltimore to discriminate against any employee by removing him from the crew and depriving him of work because he expresses dissatisfaction with or questions the Union's rotation policy or the way it is carried out.

WE WILL NOT in any like or related manner restrain or coerce any employee of ITO Corporation of Baltimore in the exercise of any rights guaranteed in Section 7 of the Act.

WE WILL make Roger Lee Moore whole for any earnings lost as a result of our unlawful conduct against him, plus interest.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333, AFL-CIO

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge: A hearing was conducted in Baltimore, Maryland, on November 8, 1982, on complaint issued July 9, 1982, alleging violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, based principally on the Respondent's alleged refusal to permit Moore to work on May 27, 1982, because he questioned the actions of a union official.

Based on the record evidence, my observation of witness demeanor and closing arguments of counsel, who waived their right to file posttrial briefs, I make the following findings of fact and conclusions of law.

I. JURISDICTION

The complaint alleges, the Respondent at the hearing admitted, and I find that ITO Corporation of Baltimore is an employer within the meaning of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Respondent is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Labor on the Baltimore docks is ordered by the Employer each evening for the following day. Ordinarily, a

full 12-member crew is ordered. Ocassionally, however, less than a full crew is needed, in which case work is to be assigned by the "gang carrier" (crew leader) in accordance with practices established by the Union. The dispute in this case arose out of just such an occurrence.

Based on the clear and convincing—and thus credited—testimony of Union President McFadden, I find that, since 1974, union policy requires the gang carrier to assign short crew work to crewmembers on a per-day rotation basis, regardless of seniority within the crew and regardless of the number of hours worked on any given day. Thus, if five men were ordered for the first day of a job, the gang carrier has absolute discretion as to which five crewmembers worked that day. If, on the next short crew day, only five men were ordered, the gang carrier was required to offer work to five men who had not worked the previous short crew day, even though the original five men had worked only short hours. On the third short crew day, he must offer work to the remaining unused members, before beginning the rotation cycle again. In addition, the gang carrier was required to carry through the rotation cycle on the next short crew day, regardless of when it might occur. The purpose of the policy was to counteract longstanding practices of favoritism shown certain crewmembers by the gang carrier. This policy was selected rather than one which would seek to equalize hours, since the nature of the industry is such that one could not predict how many hours would be worked on any given short crew day. Again, the nature of the industry allows enforcement of the practice only when a crewmember complains to a union official. In such a case, the Union's walking delegate or any other union official will take up the matter directly with the gang carrier to insure compliance with the practice. Refusal by the gang carrier to comply could result in his removal by the union official dealing with the complaint.

B. *The May 27 Job Action Against Moore*

On Wednesday, May 26, 1982, gang carrier Schlicting assigned seven men, including Moore, to fill a short crew order he received the previous day. Several days of short crew work were anticipated for this ship. His gang (Donald's gang) ordinarily consisted of 12 men and this was the first time since becoming gang carrier 10 months earlier that he was required to apply the Union's short crew rotation procedure. Moore, who was third in gang seniority, was a close personal friend and one-time business associate of the gang carrier.

Due to equipment problems, however, the Wednesday seven-man crew was unable to perform much work and they received only 4 hours' reporting pay.

Another short crew of five men was ordered by the Employer for Thursday. The gang carrier assigned that work to five of the men, including Moore, who had worked on Wednesday. This assignment was clearly in violation of the Union's rotation practice. The crew had assembled at the jobsite prior to the 8 a.m. starting time, but had not yet had their numbers punched in, when the events surrounding this alleged violation occurred.

Earlier that morning, at 6 a.m., Union President McFadden received a telephonic complaint from another member of Donald's crew that he had not been assigned work that day, that the same men who had worked on Wednesday were to be worked again on Thursday, and that Donald's friend, Moore, was getting an advantage over other crewmembers. McFadden took several steps: he left instructions at the dispatcher's office that Donald's crew was to be rotated, he instructed the complaining crewmembers to report to the jobsite, and he instructed walking delegate Howell to take care of the problem by having Donald replace one of the crew with the complaining member.

Howell approached Donald and his crew and walked into the proverbial buzz saw. No sooner had he instructed Donald to rotate the crew, to knock off one member of his choice, and to replace him with the complaining member, than Moore interjected himself into the conversation between Howell and Donald by telling Donald, in a belligerent tone, not to replace any crewmember and that the Union's walking delegate had no authority or right to issue such instructions to a gang carrier. Howell again directed his instructions to Donald to "pick someone" to be dropped; Moore continued to rage and intervene; and Donald continued to refuse to strike one member of the crew he had selected for that day. At this point, Howell instructed Donald to strike Moore from the crew for that day because Moore was "interfering with" Howell's exercise of his official union duties.

By this time, the dispute extended beyond the 8 a.m. starting time and the crew had not commenced their work on the ship. Throughout, the conversation was laced with profanity commonly used on the docks.

The participants took the raging dispute to McFadden. Moore asked him what right he had to tell the gang carrier to rotate and complained as to the manner in which he was spoken to by Howell. McFadden explained that rotation was a union policy since 1974, that Moore had precipitated Howell's actions against him, that Moore was not to interfere with a walking delegate's business conversations with a gang carrier, and that he was knocked off the crew for that day because he "interfered" with Howell's performance of duties.

There is no evidence on this record of any hostility against Moore on the part of McFadden, Howell, or any other union official, before or after May 27. While Moore did not work on Thursday, he did work each of the 2 days thereafter on which a short crew was ordered for this ship. The next time Donald received orders for a short crew, he first consulted with union officials before selecting his crew.

To a large extent, the relevant facts are undisputed. Where there is an evidentiary conflict, I have credited the testimony of McFadden and Howell over that of Donald and two of his crew. The former, by their demeanor on the witness stand and by their clear and coherent testimony, convinced me that their account of the brief, but tumultuous events of that Thursday morning was the more accurate one.

C. *The Alleged May 27 Threats by Howell*

The complaint alleges two threats on May 27 by walking delegate Howell.

The first is based on an alleged threat to remove Donald as gang carrier unless Donald unlawfully struck Moore from the Thursday short crew. In this connection, Donald testified that Howell threatened to remove Donald's number if he did not strike Moore. But the facts, as found above based on the credited testimony of Howell and McFadden, were that Donald had violated established union rotation procedures, that he was refusing to take corrective action by striking one crew member of his choice, and that gang carriers could be removed for violation of union policy. The threat of removal, I find, was not based on Donald's refusal to strike Moore, but rather on Donald's refusal to strike any one member of his choice so as to correct his violation of union rotation procedures by making a slot available to the complaining member who had not worked the previous day. Since the object of the threat was to enforce a concededly valid union policy and not, as alleged, to unlawfully strike Moore from the Thursday short crew, the General Counsel's case in this regard fails for want of evidence.

The second is based on an alleged threat to Moore, conveyed by Howell through the gang carrier, that Moore should go to the NLRB to get a job on Friday. Again, gang carrier Schlicting testified that, on Thursday evening, May 27, after he had accompanied Moore to the Board's offices as a "witness," where a charge was filed by Moore, he spoke with Howell. Howell, after inquiring why the gang carrier went to the Board and after being told the reason, commented that the gang carrier was stabbing him in the back after having gotten "all this work" and said that he could tell Moore to go to the Board to get a job for the following day. The gang carrier related this conversation to Moore the next day, Friday. At the hearing, he conceded that he did not take Howell seriously and that, in his opinion, Howell was simply letting off steam. In fact, apparently no one took the remark seriously, for the gang carrier routinely assigned to Moore work on Friday (which ran over onto Saturday) and on Sunday (which ran over onto Monday). Tested objectively, Howell's statement is just what it was taken to mean by the gang carrier himself—a nonthreatening, noncoercive, emotional release at the conclusion of a tumultuous day. *Laborers Local 496 (Newport News)*, 258 NLRB 1105 (1981), as to this allegation also, the General Counsel's case fails for want of evidence.

D. *Discussion*

The General Counsel correctly relies on *Hod Carriers Local 300 (Desert Pipeline Construction Co.)*, 145 NLRB 1674 (1964), for the proposition that a member cannot lawfully be caused to lose work because of a disrespectful, abusive, or uncooperative attitude toward a union official. In questioning the authority of walking delegate Howell, Moore initially was protected from adverse job action at the hands of union officials. However, there is a much narrower issue presented here for decision—whether Moore's conduct, under all the circumstances, was so opprobrious as to cause that statutory protection to be forfeited. I conclude, for reasons set forth herein, that it was.

Recently, the Board, in *Atlantic Steel Co.*, 245 NLRB 814 (1979), had occasion to restate the factors against which employee conduct is to be judged: (1) the place of the discussion, (2) the subject matter, (3) the nature of the employee's outburst, and (4) whether the outburst was provoked by an unfair labor practice.

In *Atlantic*, the Board gave conclusive effect to an arbitrator's decision upholding the discharge of a grievant who directed obscenities to a supervisor in a production area. To hold otherwise, the Board said, "would mean that any employee's offhand complaint would be protected activity which would shield any obscene insubordination short of physical violence. That result would not be consistent with the Act." *Id.* at 816.

Here, the exchange between Moore and Howell occurred in the presence of other gang members and on the jobsite moments before the commencement of the shift. Moore's conduct was not simply an expression of concern on his part as to the application of the Union's rotation procedures or the voicing of a different opinion. Rather, it was an insubordinate attack on a union official who was enforcing the Union's rotation procedure on complaint of a union brother under circumstances where the gang carrier clearly was acting in violation of that procedure by giving preferential employment treatment to his friend and business associate Moore and four others; it was rebellious conduct, taking the form of orders to his friend, the gang carrier, to ignore Howell's instructions and to continue with favored treatment to him at the expense of a brother; and, finally, it was conduct intended to belittle a union official in the performance of his duties and to undercut that authority on the docks. Moreover, Moore's conduct jeopardized the Union's ability to perform one of its most important obligations under its labor contract—to provide a stable labor force when and where needed. As a direct result of Moore's conduct, Donald's gang was unable to begin the shift at the regularly scheduled time.

Upon the foregoing findings of fact, conclusions of law and the entire record and, pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[1]

It is ordered and directed that the complaint herein be, and the same hereby is, dismissed.

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[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the Board, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of said Rules, be adopted by the Board and become its findings, conclusions and Order and all objections thereto shall be deemed waived for all purposes.